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STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

February 11, 2010

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

LOD No. S-28,762

Hawaii

Amendment of Grant of Perpetual, Non-Exclusive Easement to Kohanaiki Shores LLC, Grantee for Access and Utility Purposes, LOD No. S-28,762, Kohanaiki, North Kona, Island of Hawaii, Tax Map Key: 3rd/ 7-3-09: portion of Mamalahoa Trail

APPLICANT:

Kohanaiki Shores LLC, a Delaware limited liability company.

LEGAL REFERENCE:

Section 171-6 and 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Mamalahoa Trail situated at Kohanaiki, North Kona, Hawaii, identified by Tax Map Key: 3rd/ 7-3-09: portion of Mamalahoa Trail, as shown on the attached maps labeled Exhibit A.

AREA:

1,944 square feet, more or less.

ZONING:

State Land Use District:	Conservation (General Subzone)
County of Hawaii CZO:	N/A; however area is within SMA

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Partly encumbered by Grant of Non-Exclusive Easement LOD No. S-28,762 dated February 18, 2005, as amended, for access and utility purposes.

CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain and repair a right-of-way over, under and across State-owned land for access and utility purposes.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Assessment covering the construction of a road over the subject area of the Mamalahoa Trail was published in the OEQC's Environmental Notice on July 8, 1986 with a finding of no significant impact (FONSI).

A Conservation District Use Permit (CDUA HA-3124B) was approved by the Board of Land and Natural Resources on January 23, 2004.

With respect to the subject request for an amendment of the easement instrument, in accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>X</u>	NO <u>  </u>
Registered business name confirmed:	YES <u>X</u>	NO <u>  </u>
Applicant in good standing confirmed:	YES <u>X</u>	NO <u>  </u>

REMARKS:

Kohanaiki Shores LLC (Applicant) is developing a residential community together with private and public recreational facilities located on its private lands at Kohanaiki, North

Kona, Hawaii, designated as TMKs: 3rd/ 7-3-09: 03 (Parcel 3) & 7-3-09: 16 (Parcel 16). Applicant acquired these lands from Rutter/KW Kohanaiki LLC (Rutter) by Warranty Deed dated June 6, 2005. The Mamalahoa Trail runs along the length of Parcel 3 at its mauka boundary. As a result, there is no way to access Parcel 3 from Parcel 16 without breaching the trail. See Exhibit A attached.

At its meeting of January 23, 2004 (Item D-17), the Board of Land and Natural Resources approved Rutter's Conservation District Use Application HA-3124B for an easement over the trail.

At its meeting of March 12, 2004 (Item D-10), the Board approved the grant of a perpetual, non-exclusive easement to Rutter for access and utility purposes over a portion of the trail abutting Applicant's property. The easement was appraised at \$3,625, which Rutter paid. Grant of Non-Exclusive Easement LOD No. S-28,762 was then prepared and executed by the State and Rutter as of February 18, 2005. On June 6, 2005, Rutter conveyed Parcels 3 and 16 as well as the easement over the trail to Applicant pursuant to the above-referenced Warranty Deed. The Grant of Non-Exclusive Easement provides at section 5 that the easement runs with Parcel 3, provided that insurance is maintained on the area.

At its meeting of December 12, 2008 (Item D-11), the Board approved Applicant's request for an amendment of the easement that realigned the easement corridor to correspond to as-built conditions. The amendment instrument was executed on March 12, 2009.

LOD No. S-28,762, as amended, contains a standard provision at section 16 requiring the Chairperson's prior written approval for mortgages:

The Grantee shall not mortgage or pledge the premises, any portion, or any interest in this easement without the prior written approval of the Chairperson of the Board of Land and Natural Resources and any mortgage or pledge without such approval shall be null and void.

Applicant has subdivided its Parcel 3 into 118 lots, including 83 residential lots, as shown on State of Hawaii File Plan Number 2463 recorded in the Bureau of Conveyances (the "Lots"), and intends to convey title to the Lots to various purchasers together with perpetual non-exclusive rights over the subject easement. Some of the Lots will likely be further subdivided in the future with a final total of approximately 500 lots being subdivided out of Parcel 3.

In order to permit Applicant and its grantees to mortgage their Lots, including their interests in the easement, Applicant initially requested the Chairperson to issue a blanket approval of the mortgage of any and all of the Lots together with the appurtenant

easement rights. However, the Department of the Attorney General (DAG) determined that the Chairperson did not have authority to issue such a blanket consent to mortgage. DAG recommended that Applicant seek an amendment of the easement instrument to delete the mortgage approval requirement contained therein. DAG and staff have reviewed Hawaii Revised Statutes Chapter 171 and find no statutory requirement for the inclusion of the mortgage consent provision in the easement instrument. Accordingly, the Board appears to have discretion to delete the requirement.

Staff recommends the deletion of the mortgage consent provision in this case. The alternative to granting Applicant's request would be to require the Chairperson's review and approval of each mortgage of the Lots. Such a requirement would impose a significant burden on Applicant, its purchasers, and the State without a commensurate benefit to the State.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

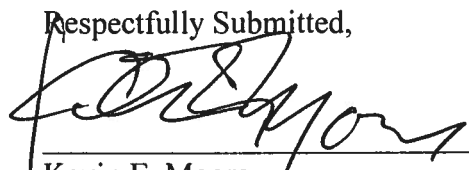
Applicant is in compliance with the terms and conditions of the easement instrument, including the maintenance of liability insurance for the easement area. Applicant will contact its insurance producer to ensure that Applicant's liability insurance coverage for the easement area extends to the use of the easement area by Applicant's purchasers once conveyances of the Lots to purchasers occurs.

RECOMMENDATION: That the Board:

1. Authorize the amendment of Grant of Non-Exclusive Easement, LOD No. S-28,762 to delete section 16 of the instrument regarding consent to mortgages in its entirety, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current amendment of perpetual easement document form, as may be amended from time to time;
  - B. Review and approval by the Department of the Attorney General; and

- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

  
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Kevin E. Moore  
District Land Agent

APPROVED FOR SUBMITTAL:

  
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Laura H. Thielen, Chairperson

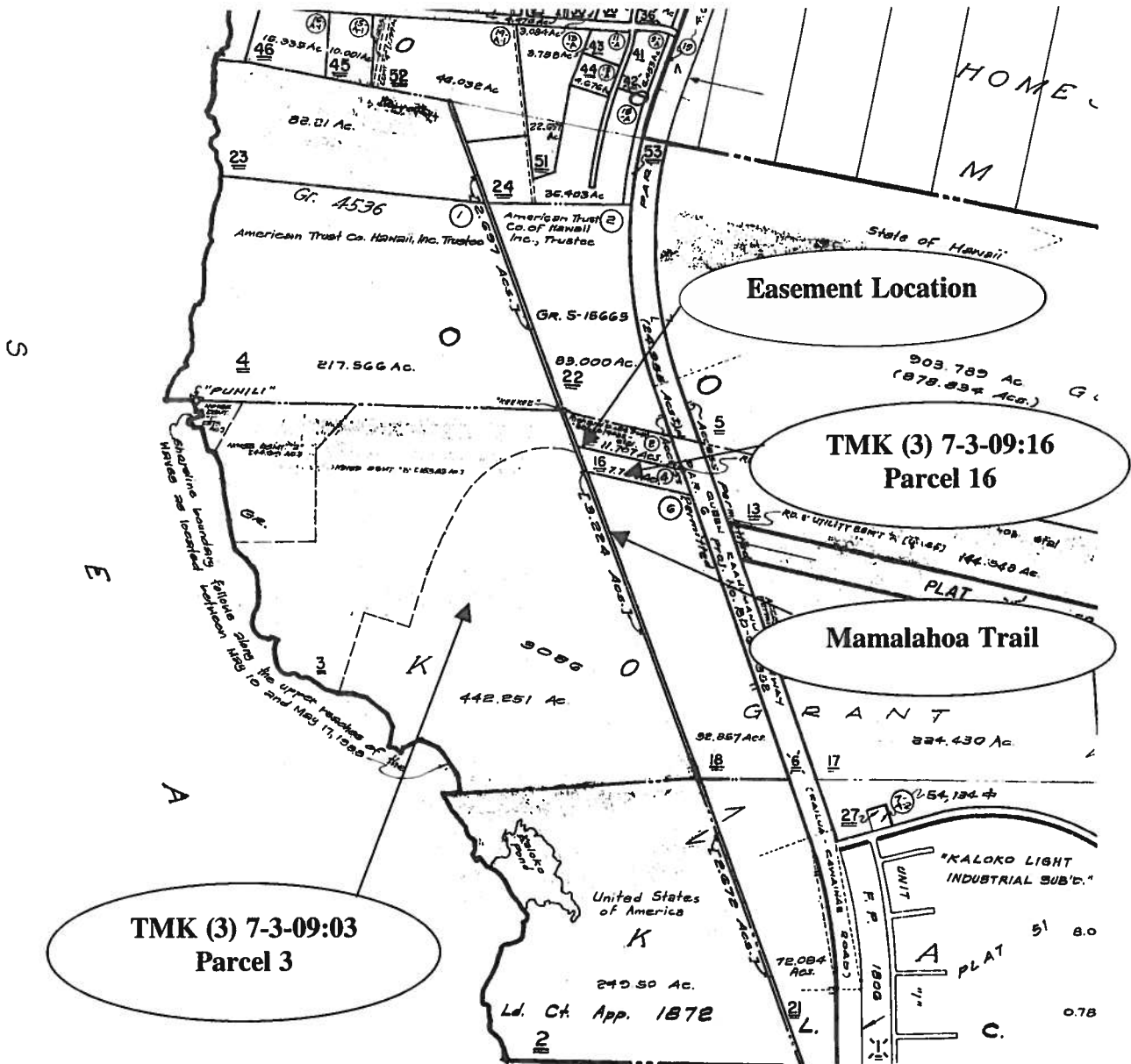


EXHIBIT A